

FILED
14 JUN -5 PM 2:43
MULTNOMAH COUNTY

IN THE CIRCUIT COURT OF THE STATE OF OREGON

FOR THE COUNTY OF MULTNOMAH

14CV06380

JESSICA GESSELE, ASHLEY ORTIZ, NICOLE
GESSELE, TRICIA TETRAULT, CHRISTINA
MAULDIN and JASON DIAZ, both on behalf of
themselves individually and, in addition, on
behalf of the other similarly situated
employees,

Plaintiffs,

vs.

JACK IN THE BOX INC., a Delaware
corporation doing business in Oregon as "Jack
In The Box Inc. A Corporation Of Delaware,"

Defendant.

Case No.

COMPLAINT

Oregon and Federal Wage and Hour,
Fiduciary Breach and Equitable/Quasi-
Contractual Claims

Damages estimated at approximately
\$45,000,000.00

Jury Trial Requested

NOT SUBJECT TO MANDATORY
ARBITRATION

Filing fee of \$1,056 per ORS 21.160(1)(e)

INDIVIDUAL, CLASS, AND COLLECTIVE ACTION COMPLAINT

1.

Jessica Gessele, Ashley Ortiz (who was named Ashley Gessele when she worked
for Jack in the Box), Nicole Gessele, Tricia Tetrault (who was named Tricia Cortes-
Cruz when she began working for Jack in the Box), Christina Mauldin (who was
named Christina Luchau during some of the time she worked for Jack in the Box) and
Jason Diaz (hereinafter collectively "Plaintiffs") complain as follows against Jack in
the Box Inc., doing business in Oregon as "Jack In The Box Inc. A Corporation Of
Delaware" (hereinafter "JACK IN THE BOX"), both on behalf of themselves

1 individually and, in addition, on behalf of the other similarly situated employees.

2 2.

3 This action is a continuation under ORS 12.220 of a previous lawsuit between the
 4 same parties. On August 13, 2010 (within the time allowed by statute), Plaintiffs filed
 5 an action against JACK IN THE BOX in the United States District Court for the
 6 District of Oregon, Case No. 3:10-cv-960-BR. JACK IN THE BOX had actual notice of
 7 the filing of that action on or before August 18, 2010 (*i.e.*, not later than 60 days after
 8 it was filed). On May 15, 2014, that action was involuntarily dismissed without
 9 prejudice for lack of original federal jurisdiction (*i.e.*, not on any ground adjudicating
 10 the merits of the action). Plaintiffs are commencing this action based upon the same
 11 claim or claims within 180 days of entry of that judgment. This action is therefore not
 12 subject to dismissal by reason of not having been commenced within the time allowed
 13 by statute.

14 3.

15 This is an action under state and federal wage and hour, common-law breach of
 16 fiduciary duty and equitable/quasi-contractual claims for certain present and former
 17 employees of JACK IN THE BOX to recover unpaid wages, actual damages, statutory
 18 damages, penalty wages, and attorney fees, costs and disbursements (and pre- and
 19 post-judgment interest thereon), as well as liquidated damages and equitable relief
 20 (including an accounting and declaratory and injunctive relief). In addition, Plaintiffs
 21 hereby give notice of their intent to seek to amend this Complaint to include a claim
 22 for punitive damages. All allegations herein are made to the best of Plaintiffs' and
 23 their counsel's good-faith knowledge, information and belief, based upon the

1 evidence adduced to date, and Plaintiffs reserve the right to amend their Complaint
 2 upon the discovery of additional facts.

3 **PARTIES**

4 4.

5 At all material times, Plaintiffs Jessica Gessele, Ashley Ortiz, Nicole Gessele,
 6 Tricia Tetrault, Christina Mauldin and Jason Diaz were residents and citizens of the
 7 State of Oregon. At all material times, Plaintiffs and the Class and Collective
 8 members were employees of JACK IN THE BOX. Plaintiffs Christina Mauldin, Jason
 9 Diaz and other Collective and Class members were employed by JACK IN THE BOX
 10 when it transferred the ownership of their stores to franchisees. Plaintiff Jessica
 11 Gessele has been employed by both JACK IN THE BOX and the subsequent
 12 franchisee owner of her store. Plaintiffs Jessica Gessele, Ashley Ortiz, Nicole Gessele,
 13 Tricia Tetrault and Jason Diaz were at all times hourly employees. Plaintiff Christina
 14 Mauldin was at times an admittedly nonexempt hourly employee, and at times a
 15 salaried Assistant Manager alleged by JACK IN THE BOX to be exempt from
 16 overtime.

17 5.

18 Defendant JACK IN THE BOX is a Delaware corporation doing business in
 19 Multnomah County, Oregon and elsewhere, with its corporate headquarters at 9330
 20 Balboa Ave., San Diego, CA 92123. JACK IN THE BOX operates a fast-food business
 21 in which it and its franchisees constitute a single integrated economic unit, over
 22 which JACK IN THE BOX has common, overall control. JACK IN THE BOX is
 23 dependent on its franchise and corporate-owned stores preparing and selling food

1 under a prescribed model, and its profits and financial well-being depend in part on
2 the success of the franchisee stores. JACK IN THE BOX specifies how many people
3 may share ownership in a franchise, the ownership percentage that each store
4 owner/operator must have in any corporate franchisee entity, what other
5 business(es) they are allowed to directly or indirectly operate, and how far they are
6 allowed to live from each restaurant, and it prohibits the sale, transfer or assignment
7 of any franchisee's ownership to any other person without prior approval and
8 payment of a fee.

9 6.

10 JACK IN THE BOX maintains the right to control any litigation in which a
11 franchisee becomes involved, and to either maintain such action in the franchisee's
12 name or substitute itself as the named defendant in its sole discretion. Any
13 innovations or improvements in products, equipment, uniforms, building design,
14 facility improvements, service format or advertising originated by a franchisee are
15 deemed "works made for hire" and remain JACK IN THE BOX's sole property
16 without compensation to the franchisee. JACK IN THE BOX maintains mandatory
17 standards and specifications that the franchisees must follow, which include the vast
18 majority of goods, services, supplies, uniforms, fixtures, equipment (including
19 computer and other technology equipment), software, real estate, building design
20 and inventory items, as well as their sources of supply. JACK IN THE BOX limits the
21 franchisees to specified suppliers of those items, and it specifically requires them to
22 purchase or lease computer software, peripheral equipment and technologic services
23 directly from JACK IN THE BOX.

7.

JACK IN THE BOX has the right to control, and does control, the manner in which its franchisees' employees' work is performed, and it specifically promulgates and implements employment policies including compensation, hiring, training, staffing levels, employee conduct, safety, timekeeping, discipline, performance evaluation, labor scheduling, labor management, management number and structure, restaurant and menu hours, workers' compensation and employer liability insurance, federal labor law compliance, personnel and payroll records, and general management policies for all of its stores, including the franchisees' stores. JACK IN THE BOX exercises its authority to control, directly or indirectly, the franchisees' timekeeping and payroll practices by requiring the use of a proprietary, licensed computerized record-keeping system (called "Kronos," and later "Jack's Timekeeping") that, among other things, tracks and computes employees' hours worked and retains payroll records, all of which are regularly retrieved and monitored by JACK IN THE BOX. To the extent that any franchisees violate their employees' rights by conforming to JACK IN THE BOX's timekeeping policies, JACK IN THE BOX knows or should know of the alleged unlawful practices at the franchisees' stores.

8.

JACK IN THE BOX further maintains control over many other aspects of the franchisees' stores that directly relate to employees and their terms and conditions of employment, including specifying the uniforms, equipment and supplies used by them; detailing the methods and procedures for performing their work; and both

1 requiring and providing extensive training on the required policies and procedures
 2 for the performance of their everyday job duties. Employees who are trained at any
 3 location need little or no additional training to work at any other location, regardless
 4 of whether either or both locations are corporate or franchised, and multiple stores
 5 from time to time share the services of the same employee. Employees and managers
 6 cannot be hired by franchisees, and they are required to be fired, if they do not
 7 conform to these JACK IN THE BOX policies. JACK IN THE BOX maintains specific
 8 requirements as to the personnel, payroll and employee training records that must be
 9 maintained by each franchisee as to that franchisee's employees, and how long those
 10 records are required to be kept, and JACK IN THE BOX has the right to inspect and
 11 audit those records at any time, with or without prior notification.

12 9.

13 JACK IN THE BOX requires each franchisee to staff its restaurants at the level
 14 required to maximize sales (JACK IN THE BOX's royalty and marketing fees being a
 15 percentage of gross sales)—the franchisees are not allowed to staff at levels designed
 16 to maximize their own profits. Each franchisee is required to authorize JACK IN THE
 17 BOX to access and take money from the franchisee's bank accounts at any time.

18 10.

19 JACK IN THE BOX requires each franchisee to undergo 10 weeks of extensive
 20 mandatory training in its policies and procedures, which takes place at the JACK IN
 21 THE BOX corporate headquarters and local corporate-owned restaurants in San
 22 Diego. JACK IN THE BOX further requires at least one manager for each of
 23 franchisee's franchised stores to undergo extensive mandatory training in San Diego

1 regarding its policies and procedures. JACK IN THE BOX further requires every
 2 other franchisee manager and non-manager employee to undergo substantial
 3 training by JACK IN THE BOX, and franchisees are also required to provide
 4 mandatory on-site training to their own employees by JACK IN THE BOX, in several
 5 additional areas specified by JACK IN THE BOX, using equipment and curriculum
 6 specified by JACK IN THE BOX.

7 11.

8 JACK IN THE BOX maintains the ability to enforce its policies by means of
 9 computer tracking; by its frequently exercised right to enter, inspect and audit the
 10 franchisees' stores (with or without notice) and to interview and provide on-the-job
 11 training for their employees; by actually exercising total control over aspects of the
 12 employees' compensation and day-to-day employment conditions; and by requiring
 13 the franchisees to: purchase/lease/rent JACK IN THE BOX's proprietary point-of-
 14 sale ("POS"), time clock, timekeeping and monitoring equipment, purchase/lease/
 15 rent JACK IN THE BOX'S proprietary POS, time clock, timekeeping and monitoring
 16 software, pay JACK IN THE BOX a mandatory fee for managing and maintaining the
 17 timekeeping and monitoring software, use (and pay for) JACK IN THE BOX'S
 18 mandatory proprietary Restaurant Technology Support call center for problems, and
 19 purchase company-specified back-office and POS hardware and software; and by
 20 JACK IN THE BOX regularly retrieving the employees' in and out punch information
 21 from the franchisees' equipment via satellite (which satellite service must also be
 22 purchased by the franchisee from a specified vendor), performing calculations on
 23 those punches at JACK IN THE BOX's San Diego corporate headquarters according

1 to its own proprietary hours-worked formulas (which the franchisees are not allowed
 2 to change even if they wanted to), and communicating only the end result of those
 3 calculations (*i.e.*, each employee's total hours worked) back to the franchisees or their
 4 payroll providers for preparation of the actual payroll checks. Franchisees are
 5 specifically prohibited from transmitting, altering, adding or deleting any of this data.

6 12.

7 Franchisees are required to strictly adhere to all of these standards, specifications
 8 and procedures, which adherence is necessary and essential to the image and success
 9 of each Jack In The Box restaurant and the Jack In The Box system as a whole. In
 10 view of the interconnection of computer systems and the necessity that such systems
 11 be compatible with each other, the franchisees are required to strictly comply with
 12 JACK IN THE BOX's standards and specifications for all item(s) associated with
 13 franchisee's computer system, and to otherwise operate the computer system in
 14 accordance with JACK IN THE BOX's standards and specifications.

15 13.

16 JACK IN THE BOX tells the franchisees that they are required to follow all
 17 applicable federal, state and local laws, including labor laws, and to notify JACK IN
 18 THE BOX in the event the franchisee receives notice of violation of any such law.
 19 Franchisees violating federal labor laws are deemed to be in default of their franchise
 20 agreements. JACK IN THE BOX maintains the contractual right to access any and all
 21 information contained in the franchisees' personal computer systems, POS systems
 22 and satellite communications systems, and it has the power to stop these
 23 employment violations by conforming its own proprietary procedures to the

1 applicable law, and/or by terminating, or threatening to terminate, the franchise
 2 agreements of those who refuse to bring their policies into compliance with
 3 applicable law. JACK IN THE BOX is therefore an employer, joint employer and/or
 4 co-employer of the franchisee employees, as well as the sole employer of its own
 5 employees.

6 COMMON FACTS

7 14.

8 At all relevant times, Plaintiffs and the other hourly employees were employed at
 9 or very near the Oregon minimum wage. For each Plaintiff, nonpayments and
 10 deductions from pay as enumerated herein reduced their pay for a given workweek
 11 below the level of the applicable minimum wage for that workweek.

12 15.

13 Though each Plaintiff's schedule varied from week to week, each Plaintiff
 14 sometimes worked over 40 hours in a given workweek, and sometimes less. For some
 15 weeks in which they worked over 40 hours, nonpayments and deductions from pay as
 16 enumerated herein reduced their pay, resulting in nonpayment of time-and-a-half for
 17 overtime for that workweek.

18 16.

19 Plaintiffs base this class and collective action on four categories of violations by
 20 JACK IN THE BOX: Oregon Workers' Benefit Fund assessment overdeductions, shoe
 21 deductions, unpaid breaks, and the transfer of Oregon stores to franchisees. Each of
 22 these categories is discussed below.

23 ///

Wrongful Deductions for Oregon Workers' Benefit Fund

17.

The Oregon Workers' Benefit Fund is a program that provides various benefits to workers injured on the job in Oregon. The program is funded by an assessment that every employer and employee pays to the State of Oregon, based on the number of hours worked by that employee. Each Fall, the State of Oregon publishes the new Workers' Benefit Fund assessment rate both in print and on the web, and it also mails out a written notice of the new rate to all employers registered with the Oregon Secretary of State. JACK IN THE BOX has been continuously registered with the Oregon Secretary of State, with the same mailing address, for over 25 years.

18.

The Workers' Benefit Fund assessment is supposed to be divided evenly between the employer and employee. So, for example, in 2003, the Workers' Benefit Fund assessment rate was 3.6 cents per hour. The employer was required to withhold 1.8 cents from each of its employees' paychecks for every hour that they worked during that pay period. And at the end of the quarter, the employer was supposed to pay the State of Oregon 3.6 cents for every hour worked by its employees (the 1.8 cents withheld from the employee, plus another 1.8 cents from its own pocket for the employer portion).

19.

Every year since 2003, the Workers' Benefit Fund assessment rate has been lower than 3.6 cents per hour. Every year since 2003, the State of Oregon sent written notice of the new assessment rate to JACK IN THE BOX's corporate headquarters at

the address registered with the Oregon Secretary of State, 9330 Balboa Ave., San Diego, CA, 92123. JACK IN THE BOX also has contracts with several vendors who update JACK IN THE BOX whenever any of the tax rates changes in any of the states in which it does business. Yet every year since 2003, JACK IN THE BOX has continued to withhold 1.8 cents per hour from its employees' wages (the higher 2003 rate, not the current year's lower rate). Meanwhile, every year since 2003, JACK IN THE BOX has only been paying the actual then-current Workers' Benefit Fund assessment rate to the State of Oregon (which were all lower than the 2003 rate). The following chart shows the Workers' Benefit Fund assessment rate for each year since 2003, the portions due from the employer and employee, the portion actually paid by JACK IN THE BOX, and the portion actually paid by the employees:

Year	WBF Rate	Employer Portion	Employee Portion	Jack Paid	Employees Paid
2003	3.6 ¢	1.8 ¢	1.8 ¢	1.8 ¢	1.8 ¢
2004	3.4 ¢	1.7 ¢	1.7 ¢	1.6 ¢	1.8 ¢
2005	3.4 ¢	1.7 ¢	1.7 ¢	1.6 ¢	1.8 ¢
2006	3.0 ¢	1.5 ¢	1.5 ¢	1.2 ¢	1.8 ¢
2007	2.8 ¢	1.4 ¢	1.4 ¢	1.0 ¢	1.8 ¢
2008	2.8 ¢	1.4 ¢	1.4 ¢	1.0 ¢	1.8 ¢
2009	2.8 ¢	1.4 ¢	1.4 ¢	1.0 ¢	1.8 ¢
2010	2.8 ¢	1.4 ¢	1.4 ¢	1.0 ¢	1.8 ¢
2011	2.8 ¢	1.4 ¢	1.4 ¢	1.0 ¢	1.8 ¢
2012	2.8 ¢	1.4 ¢	1.4 ¢	1.0 ¢	1.8 ¢

In other words, every year since 2003, the employees have been paying more than half of JACK IN THE BOX's Workers' Benefit Fund assessment. The employees did not owe the State of Oregon as much as JACK IN THE BOX was withholding from their wages. JACK IN THE BOX's overwithholding from its employees was therefore an unlawful deduction from their wages.

20.

For Plaintiffs and the other employees, that deduction reduced their pay below the minimum wage and resulted in their not receiving time-and-a-half for their overtime hours. We know that JACK IN THE BOX knew the current rate during every one of those years, since it paid the State of Oregon at the correct rate. JACK IN THE BOX's overwithholding from its employees therefore had to be willful.

Shoe Deductions

21.

An employer cannot make its employees pay for the employer's expenses. If an expense benefits the employer, the employer can't require employees to pay for it. One kind of expense that benefits an employer is a uniform—having all of the employees look alike provides an atmosphere conducive to the employer's business. If an employer wants its employees to wear a uniform, therefore, the employer has to buy those uniforms. That is true under both state and federal law—an employer can't make the employees buy a uniform to wear for their work. Generic elements such as "white shirt" or "dark pants" are not considered to be a uniform, since they are common and worn on the street. JACK IN THE BOX required each of its restaurant employees to wear a uniform shirt, apron and hat, so it provided each of its restaurant employees with three uniform shirts, an apron and a hat.

22.

JACK IN THE BOX also required its restaurant employees to wear a specific kind of nonslip shoes, with a specific minimum coefficient of friction level of 0.5, made by a specific company-approved manufacturer. JACK IN THE BOX started the

1 mandatory nonslip shoe program in the early 2000's to reduce its workers'
2 compensation costs. JACK IN THE BOX commissioned a study by a testing
3 laboratory to see which shoes met the minimum level of slip resistance. But JACK IN
4 THE BOX did not allow its employees to wear just any of the shoes that passed that
5 test. JACK IN THE BOX only allowed its employees to wear shoes from an approved
6 list of manufacturers, who gave certain benefits to JACK IN THE BOX: the
7 manufacturers had to offer JACK IN THE BOX a guarantee, and they had to pay
8 JACK IN THE BOX a kickback/commercial bribe. The guarantee was that the shoe
9 maker would pay the first \$5,000 of any medical expense claim resulting from a slip
10 and fall while an employee was wearing that manufacturer's brand of shoes that the
11 employee paid for through payroll deduction. The kickback/commercial bribe was
12 that the shoe manufacturer would pay \$2 to JACK IN THE BOX for every pair of
13 shoes that an employee paid for through payroll deduction. Those extra perks paid to
14 JACK IN THE BOX made the shoes more expensive, but JACK IN THE BOX didn't
15 allow its employees to wear the less expensive shoes made by manufacturers that
16 didn't offer those perks to JACK IN THE BOX (even if those less expensive shoes met
17 the coefficient of friction requirements).

18 23.

19 When an employee was told by their manager that they had to order the shoes, the
20 employee picked out a pair from the designated catalog of the approved
21 manufacturer. The manager would then phone in the employee's order. The
22 manufacturer would ship the shoes directly to the employee's manager and invoice
23 JACK IN THE BOX for the full catalog price of the shoes. JACK IN THE BOX would

1 pay the manufacturer the full catalog price of the shoes and then deduct that full
 2 catalog price from the employee's wages over four paychecks. The President of Jack
 3 in the Box personally approved this deduction arrangement.

4 24.

5 Each quarter, JACK IN THE BOX gets a kickback/commercial bribe (they call it a
 6 "rebate") check from the shoe manufacturer for \$2 per pair of shoes ordered by the
 7 employees through payroll deduction. Under federal law (sometimes called the
 8 *Pittsburgh Milk* doctrine), when a middleman receives a trade discount from a
 9 vendor, that trade discount is supposed to be combined with the original price, and
 10 the resulting net price is the one used for accounting. In other words, the middleman
 11 doesn't have the full purchase price as an expense and the trade discount as separate
 12 income—the two numbers are supposed to combine to lower the initial purchase
 13 price. In this way, a kickback is treated exactly the same way for accounting purposes
 14 as if there had simply been a reduction in the middleman's original price. According
 15 to the law, then, JACK IN THE BOX isn't paying the full catalog price and then later
 16 receiving separate income of \$2 per pair of shoes; the \$2 kickback/commercial bribe
 17 has to be combined with the catalog price. The net price JACK IN THE BOX pays for
 18 each pair of shoes is therefore \$2 less than the price listed in the catalog. But the
 19 lower net price from the \$2 kickback/commercial bribe was not passed on to the
 20 employees—they had to pay the full catalog price. Indeed, the employees were never
 21 even told about the \$2 kickback/commercial bribe/"rebate." The employees therefore
 22 paid \$2 more per pair of shoes than JACK IN THE BOX did. Since Plaintiffs started
 23 working there, JACK IN THE BOX has received well over \$1,000,000.00 in kick-

1 backs/bribes from Shoes for Crews alone (one of the approved shoe manufacturers).

2 25.

3 Because JACK IN THE BOX got a \$2 secret kickback/commercial bribe per pair of
4 approved shoes, plus a medical expense guarantee for injured workers wearing
5 approved shoes, plus an annual \$3 Million savings in workers' compensation
6 expenses, the approved shoes benefitted JACK IN THE BOX. The shoes are part of a
7 uniform, for the company's benefit, and on top of that, the company charged more for
8 them than it paid for them. The company's requiring employees to purchase those
9 shoes (and the deduction of the price from their wages) was therefore a violation of
10 wage and hour law.

11 26.

12 Furthermore, the shoe deductions resulted in Plaintiffs and the other employees
13 receiving less than the minimum wage, and less than time-and-a-half for their
14 overtime. We know that JACK IN THE BOX knew its policies might be illegal,
15 because JACK IN THE BOX has been sued before for these wrongful shoe
16 deductions. But they still didn't change their policy. That, and the fact that the
17 company President personally approved the deduction arrangement, plus the fact
18 that there was never any written contract or other agreement putting the secret \$2
19 kickbacks in writing, show that the violation was willful. Finally, Jack in the Box
20 claims that its employees authorized these shoe deductions in writing, but it has
21 willfully destroyed all of those supposed authorizations. That ongoing destruction
22 continued after Jack in the Box was sued in another state for the same violations, it
23 continued after Plaintiffs sent a demand for their documents, and it continued for

1 years after this lawsuit was filed. As a result, there is no longer any written record
 2 that any Plaintiff or employee authorized any given shoe deduction (if indeed there
 3 ever was).

4 27.

5 JACK IN THE BOX also acted as the employees' purchasing agent with respect to
 6 the shoes. That means that JACK IN THE BOX bought the shoes at the employees'
 7 request and on their behalf (not for itself). Purchasing agents have a duty of loyalty
 8 under common law. That means that JACK IN THE BOX was required to act in its
 9 employees' best interest. Purchasing agents are not supposed to accept
 10 kickbacks/commercial bribes from the people they buy their goods from. It creates a
 11 conflict of interest—the employees' best interest may be to buy a cheaper shoe, but
 12 the purchasing agent's best interest may be to go with a more expensive shoe as long
 13 as it gets a kickback/commercial bribe from the vendor. That is exactly what
 14 happened here. JACK IN THE BOX accepted kickbacks/commercial bribes from shoe
 15 vendors in order to give them access to its captive pool of employees who were
 16 required to purchase those shoes. By accepting those kickbacks/commercial bribes,
 17 JACK IN THE BOX breached its fiduciary duty to its employees. JACK IN THE BOX
 18 now has to give back those kickbacks/commercial bribes to its employees.

19 28.

20 Under equitable principles, the Plaintiffs and class members have a greater right
 21 to that money than JACK IN THE BOX does. JACK IN THE BOX should therefore
 22 provide an accounting of all of the money it has taken, and return that money to the
 23 employees it was taken from. Because the Plaintiffs and class members' purchases of

1 the shoes from JACK IN THE BOX were not voluntary, they are entitled to rescind
 2 their purchases and get their money back. JACK IN THE BOX should also be
 3 prohibited from operating similar kickback/commercial bribery schemes in the
 4 future.

5 29.

6 The first time anyone disclosed that JACK IN THE BOX was collecting these
 7 kickbacks/commercial bribes from the shoe manufacturers was during the February
 8 6, 2012 deposition of Gene James, its Director of Asset Protection, when he revealed
 9 that information unprompted by Plaintiffs' counsel. Neither Plaintiffs nor their
 10 counsel knew or had any reason to know of the kickbacks/commercial bribes prior to
 11 that date.

12 **Failure to Pay for Rest Periods**

13 30.

14 Oregon and federal law require employers to pay for breaks of fewer than 30
 15 minutes. Breaks of fewer than 30 minutes are considered "rest periods," which are for
 16 the employer's benefit in that they increase employees' productivity during the time
 17 that they are working. That is why rest periods are counted as part of hours worked. A
 18 bona fide "meal period" is an uninterrupted period of 30 minutes or more, where an
 19 employee does no work and has time to eat a full meal. Bona fide meal periods are
 20 not counted as part of hours worked.

21 31.

22 JACK IN THE BOX's standard meal periods are supposed to be at least 30
 23 minutes long. But they specifically train their managers that the needs of the

1 restaurant come first, and if the managers need employees to come back early from
2 breaks to help out during a rush period, they should do so. Indeed, Plaintiffs and the
3 other employees were required to sign On-Duty Meal Policy agreements when their
4 employment began. In each of those agreements, JACK IN THE BOX promised the
5 employee that if their work prevented them from receiving a full meal period, they
6 would be paid for all of that time. But JACK IN THE BOX didn't honor those
7 agreements, or the law. JACK IN THE BOX decided that the line between paid and
8 unpaid breaks should be at 20 minutes (not 30 minutes as required by Oregon and
9 federal law and the agreements that every employee signed). JACK IN THE BOX
10 therefore programmed its computers not to pay employees for any break longer than
11 20 minutes.

12 32.

13 Jack in the Box has used two timekeeping systems since Plaintiffs started working
14 there. The first was the Kronos system, which tracked only the time of each
15 employee's punch (it did not track whether the punch was a punch in, a punch out, or
16 whether it was for a rest or meal period). Under the Kronos system, JACK IN THE
17 BOX programmed its computers to compensate employees only for breaks of 20 or
18 fewer minutes. If the time between a punch out and a punch in was 21 minutes or
19 longer, none of the break was paid.

20 33.

21 The newer system is referred to as Jack's Timekeeping. Under the new Jack's
22 Timekeeping system, JACK IN THE BOX reprogrammed its computers to require
23 employees clocking out to designate why they are clocking out (whether it be for an

1 intended rest period, an intended meal period, or for the end of their shift). When an
 2 employee clocks back in from a rest period, the Jack's Timekeeping system has been
 3 programmed to compensate the employee for only the first 20 minutes, regardless of
 4 the actual length of the rest period. The Jack's Timekeeping system prohibits
 5 employees from clocking in from a meal period prior to 30 minutes without a
 6 manager's override. This change was specifically made because JACK IN THE BOX
 7 knew that employees were not being allowed to take their full meal periods. Under
 8 Jack's Timekeeping, none of the time in a so-called "meal period" is paid, regardless
 9 of its length. Therefore, if an employee clocked out for a so-called "meal period" but
 10 was required by their manager to return to work after 5 minutes, they were not paid
 11 for that 5-minute break (as required by Oregon and federal law and the agreements
 12 that each employee signed).

13 34.

14 JACK IN THE BOX spent over seven years developing and testing the new Jack's
 15 Timekeeping system before it was implemented. That means that for the entire time
 16 since Plaintiffs started working there, JACK IN THE BOX specifically and provably
 17 knew that its employees were not being allowed to take their full 30-minute meal
 18 periods, and those employees were still not paid for that time. That shows that the
 19 violation was willful.

20 35.

21 Under the Kronos system, JACK IN THE BOX programmed its computers not to
 22 count as hours worked rest or meal periods of longer than 20 but less than 30
 23 minutes. Under the Jack's Timekeeping system, JACK IN THE BOX programmed its

1 computers not to count as hours worked any rest period exceeding 20 minutes, nor
 2 *any* break begun as a “meal period” regardless of its length. Plaintiffs and the other
 3 employees are entitled to be paid for that time. Furthermore, the nonpayment for
 4 those hours worked resulted in Plaintiffs and the other hourly employees receiving
 5 less than the minimum wage, and less than time-and-a-half for their overtime.

6 36.

7 Incredibly, JACK IN THE BOX not only cuts off its own employees’ paid breaks at
 8 20 instead of 30 minutes, it also *requires its franchisees to follow that same rule*.
 9 JACK IN THE BOX requires its franchisees to use both its timekeeping hardware and
 10 its timekeeping software system. JACK IN THE BOX then retrieves the employees’ in
 11 and out punches from the franchisees’ computers by satellite, performs all of the
 12 calculations on those in and out punches at its corporate headquarters in San Diego,
 13 and then posts each employee’s total hours on a web portal for the franchisees and
 14 their payroll companies to download when it comes time to cut the paychecks. This
 15 arrangement is mandatory, and franchisees are not allowed to use a 30-minute
 16 dividing line even if they want to. Therefore, even though the franchisees are the ones
 17 that cut the checks, JACK IN THE BOX retains control of the employees’ clock-in and
 18 clock-out procedures, the storage of those records, the retrieval of records, the
 19 calculation of employees’ total hours worked, and the communication of those total
 20 hours worked to the franchisees’ payroll processing companies. JACK IN THE BOX is
 21 therefore an employer, joint employer and/or co-employer of the franchisee
 22 employees for purposes of these meal period violations.

23 ///

Franchise Transfer Paychecks

37.

Plaintiffs Christina Mauldin, Jason Diaz and the other employees of company-owned stores in Oregon that were transferred to the ownership of a franchisee did not receive their earned and unpaid wages within the period required by law following that transfer of ownership. In addition, as a result of the nonpayments and deductions indicated herein, the final paychecks that Plaintiffs did receive did not contain all wages due and owing to them. JACK IN THE BOX is therefore liable for damages to each employee who was employed at the time their store was transferred who was not paid the business day after their last day as a corporate employee. For example, both Christina Mauldin and Jason Diaz were employed by the corporation on Sunday, March 28, 2010, but employed by a franchisee at the same store on Monday, March 29, 2010. Their final paychecks from JACK IN THE BOX were therefore due on March 29, 2010. But they were not paid until March 30, 2010. The store transfers at issue include (per Jack in the Box's own in-house counsel) 6 stores transferred on May 1, 2006, 21 stores transferred on March 29, 2010, 13 stores transferred on March 7, 2011, and 3 stores transferred on September 30, 2011.

FACTS SPECIFIC TO ONE OR MORE NAMED PLAINTIFFS

38.

To avoid overtime, to reduce a manager's reported labor costs, and for other reasons, the managers would from time to time alter an employee's hours, or transfer an employee's reported hours from one store to another or from one workweek or pay

1 period to another. This resulted in nonpayment of wages and/or overtime.

2 39.

3 On several occasions, one or more Plaintiffs were required to work off the clock
4 while transferring inventory from store to store, going to the bank, or performing
5 various other tasks for their employer.

6
7 **COLLECTIVE ACTION ALLEGATIONS**

8 40.

9 Plaintiffs and the other Collective members are similarly situated in all relevant
10 respects. This action is brought on behalf of the following Collectives:

- 11 1. **FLSA WBF Collective**, consisting of all current and former
12 employees of JACK IN THE BOX who had an Oregon Workers'
13 Benefit Fund ("WBF") assessment deducted from a paycheck
14 that covered a week in which the employee worked more than
15 40 hours, on or after January 1, 2004.
- 16 2. **FLSA Shoe Collective**, consisting of all current and former
17 employees of JACK IN THE BOX who had a deduction to pay
18 for shoes taken from a paycheck that covered work performed
19 in Oregon and included a week in which the employee worked
20 more than 40 hours.
- 21 3. **FLSA Unpaid Break Collective**, consisting of all current and
22 former employees of JACK IN THE BOX or its franchisees who,
23 in a workweek in which they worked more than 40 hours, (a)

1 took a break of at least 20 minutes but less than 30 minutes in
2 either timekeeping system, and/or (b) clocked out for a “meal
3 period” of less than 30 minutes in the Jack’s Timekeeping
4 system.

5 6 **CLASS ACTION ALLEGATIONS**

7 41.

8 JACK IN THE BOX engaged in acts and practices that violated the Class
9 members’ rights under Oregon statutory and common law. This action is brought on
10 behalf of the following Classes:

- 11 1. **Oregon WBF Class**, consisting of all current and former
12 employees of JACK IN THE BOX who had an Oregon Workers’
13 Benefit Fund (“WBF”) assessment deducted from a paycheck
14 on or after January 1, 2004.
- 15 2. **Oregon Shoe Class**, consisting of all current and former
16 employees of JACK IN THE BOX who had a deduction to pay
17 for shoes taken from a paycheck that covered work performed
18 in Oregon.
- 19 3. **Oregon Unpaid Break Class**, consisting of all current and
20 former employees of JACK IN THE BOX or its franchisees who,
21 in a workweek in which they performed work in Oregon,
22 (a) took a break of at least 20 minutes but less than 30 minutes
23 in either timekeeping system, and/or (b) clocked out for a

1 “meal period” of less than 30 minutes in the Jack’s
2 Timekeeping system.

- 3 4. **Oregon Store Transfer Class**, consisting of all current and
4 former employees of JACK IN THE BOX who were employed at
5 the time the Oregon store they worked at was transferred to
6 franchise ownership.

7 **Numerosity**

8 42.

9 Each of the above Classes is so numerous that joinder of all members is
10 impractical, consisting of thousands of persons each (there are over 50 Jack in the
11 Box locations in Oregon, with many employees per store and a high turnover rate).

12 **Commonality**

13 43.

14 There are questions of law and fact common to each class, which predominate
15 over any issues involving only individual class members. The principal questions are:

- 16 a. For the Oregon WBF Class, what rate JACK IN THE BOX withheld from its
17 employees’ paychecks, what rate it was supposed to withhold, whether it
18 had notice of the proper rate, and what damages result.
- 19 b. For the Oregon Shoe Class, whether the deduction for the shoes was legal
20 under Oregon law, whether the deductions and/or shoes were for the
21 employees’ benefit, whether JACK IN THE BOX’s destruction of any
22 alleged authorizations that may or may not have existed can be remedied
23 via spoliation sanctions, whether JACK IN THE BOX was the employees’

1 purchasing agent, whether it owed them a fiduciary duty of loyalty,
 2 whether JACK IN THE BOX's receipt of kickbacks/commercial bribes from
 3 shoe manufacturers that were not passed on to the plan participants
 4 constituted a breach of fiduciary duty, what damages were suffered as a
 5 result, whether JACK IN THE BOX should be held liable for punitive
 6 damages, and what the best course of injunctive and other relief is to
 7 remedy the violations.

8 c. For the Oregon Unpaid Break Class, whether and to what extent unpaid
 9 breaks between 20 and 30 minutes (or "meal periods" of less than 30
 10 minutes) violate Oregon wage-and-hour law, whether there is a private
 11 right of action for breaks between 20 and 30 minutes (or "meal periods" of
 12 less than 30 minutes) that were taken but not paid, and what damages are
 13 available to the affected employees.

14 d. For the Oregon Store Transfer Class, whether the transfer of a store from
 15 corporate to franchisee ownership results in the termination of all of its
 16 employees for purposes of ORS 652.140, and what damages are available to
 17 the employees.

18 e. For all Classes, whether the violations were willful and what remedies are
 19 available for the violations.

20 **Typicality**

21 44.

22 Plaintiffs' claims are typical of those of the other Class members because:

23 a. One or more Plaintiffs are members of each plaintiff Class.

- 1 b. Plaintiffs' claims stem from the same practice or course of conduct that
2 forms the basis for the Class claims.
- 3 c. All of the Class members' claims are based on the same facts and legal
4 theories.
- 5 d. There is no antagonism between the interests of Plaintiffs and the Class
6 members, because their claims are for damages provided to each Class
7 member separately by statute or the common law.

8 **Adequacy Of Representation By Plaintiffs**

9 45.

10 Plaintiffs will fairly and adequately protect the interests of the Classes because:

- 11 a. There is no conflict between Plaintiffs' claims and those of the other Class
12 members.
- 13 b. Plaintiffs have retained counsel experienced in handling collective and
14 class actions involving wage and hour law, who will vigorously prosecute
15 this litigation. Plaintiffs' counsel has already committed substantial time
16 and resources towards this case and remains willing and able to devote
17 whatever additional future time and resources are necessary to pursue this
18 litigation to completion.
- 19 c. Plaintiffs' claims are typical of the claims of the Class members in that their
20 claims stem from the same practice and course of conduct that forms the
21 basis of the Class claims.

22 ///

23 ///

Compliance With ORCP 32 H

46.

Plaintiffs have complied with the requirements of ORCP 32 H by mailing a prelitigation notice and demand to Defendants at least 30 days before the commencement of this action.

Superiority Of Class Action

47.

Class resolution of this case is superior to other available methods for its fair and efficient adjudication, for at least the following reasons:

- a. The prosecution of separate actions by the Class members could both result in inconsistent adjudications establishing incompatible pay practices and, as a practical matter, dispose of the legal claims of Class members who are not parties to such separate adjudications or impede their ability to protect their interests.
- b. Plaintiffs are seeking declaratory and injunctive relief in addition to damages.
- c. The common questions of law and fact described in paragraph 43 predominate over questions affecting only individual members, and the questions affecting individuals primarily involve only calculations of individual damages.
- d. Individual class members would have little interest in controlling the litigation due to the relatively small size of most claims, the relatively unsettled nature of this area of the law, the complexity of the numerical

1 and legal claims, the expense of the litigation, and because the named
2 Plaintiffs and their lawyer have already invested significant resources in
3 the case and will continue to vigorously pursue the claims on behalf of the
4 class members.

5 e. Plaintiffs have already prosecuted this case for almost four years in federal
6 court. To their knowledge, no other similar litigation has been commenced,
7 but if commenced, it could be coordinated under ORCP 32 K.

8 f. This is a desirable forum because Defendant does business in this county
9 and many (likely most) of the class members reside here.

10
11 **FIRST CLAIM FOR RELIEF**

12 **Oregon Minimum Wage Claim**

13 48.

14 All previous paragraphs are incorporated by reference herein.

15 49.

16 Pursuant to ORS 653.025, JACK IN THE BOX was required to pay Plaintiffs and
17 the Class members at least the amount of the applicable Oregon minimum wage,
18 when those wages were due, but willfully failed to do so.

19 50.

20 Plaintiffs and the Class members are entitled to collect the difference between
21 their wages received when due and the Oregon minimum wages due in an amount to
22 be proven at trial, together with attorney fees, costs and disbursements, as well as
23 pre- and post-judgment interest and the 30 days of statutory penalty wages provided

1 by ORS 653.055 and 652.150.

2
3 **SECOND CLAIM FOR RELIEF**

4 **Oregon Overtime Claim**

5 51.

6 All previous paragraphs are incorporated by reference herein.

7 52.

8 Pursuant to ORS 653.261, JACK IN THE BOX was required to pay Plaintiffs and
9 the Class members one and one half times their regular rate of pay for all hours
10 worked in excess of 40 in a given workweek, when those wages were due, but willfully
11 failed to do so.

12 53.

13 Plaintiffs and the Class members are entitled to collect the difference between the
14 wages received when due and the overtime wages due in an amount to be proven at
15 trial, together with attorney fees, costs and disbursements, as well as pre- and post-
16 judgment interest and the 30 days of statutory penalty wages provided by ORS
17 653.055 and 652.150.

18
19 **THIRD CLAIM FOR RELIEF**

20 **Oregon Unpaid Wages Upon Termination Claim**

21 54.

22 All previous paragraphs are incorporated by reference herein.

23 ///

1 55.

2 Pursuant to ORS 652.140, JACK IN THE BOX was required to pay Plaintiffs and
3 the Class members all wages due by the statutory deadline upon termination of their
4 employment but willfully failed to do so.

5 56.

6 Plaintiffs and the Class members are entitled to collect all wages remaining due,
7 in an amount to be proven at trial together with attorney fees, costs and
8 disbursements, as well as pre- and post-judgment interest, and the 30 days of
9 statutory penalty wages provided by ORS 652.150.

10
11 **FOURTH CLAIM FOR RELIEF**

12 **Oregon Wrongful Deductions Claim**

13 57.

14 All previous paragraphs are incorporated by reference herein.

15 58.

16 Pursuant to ORS 652.610, JACK IN THE BOX was prohibited from deducting
17 certain amounts from the paychecks of Plaintiffs and the Class members but willfully
18 did so.

19 59.

20 Plaintiffs and the Class members are entitled to (for each violation) the greater of
21 \$200 or actual damages in an amount to be proven at trial, pursuant to ORS 652.615,
22 together with attorney fees, costs and disbursements, as well as pre- and post-
23 judgment interest.

FIFTH CLAIM FOR RELIEF

Oregon Unpaid Wages Claim

60.

All previous paragraphs are incorporated by reference herein.

61.

Pursuant to ORS 652.120, JACK IN THE BOX was required to pay Plaintiffs and the Class members all wages due, when those wages were due, but willfully failed to do so.

62.

Plaintiffs and the Class members are entitled to collect the wages due in an amount to be proven at trial, together with attorney fees, costs and disbursements, as well as pre- and post-judgment interest.

SIXTH CLAIM FOR RELIEF

FLSA Overtime Claim

63.

All previous paragraphs are incorporated by reference herein.

64.

Pursuant to 29 U.S.C. § 207, JACK IN THE BOX was required to pay Plaintiffs and the Collective members at least one and one half times their regular rate of pay for all hours worked in excess of 40 in a given workweek, when those wages were due, but willfully failed to do so.

///

1 65.

2 Plaintiffs and the Collective members are entitled to collect the difference between
3 their wages received when due and the overtime wages due in an amount to be
4 proven at trial, in addition to liquidated damages in the same amount, together with
5 attorney fees, costs and nontaxable expenses, pursuant to 29 U.S.C. § 216(b).

6
7 **SEVENTH CLAIM FOR RELIEF**

8 **Oregon Common Law Breach of Fiduciary Duty Claim**

9 66.

10 All previous paragraphs are incorporated by reference herein.

11 67.

12 JACK IN THE BOX required Plaintiffs and the Class members to purchase a
13 specific quality of slip-resistant shoes from its list of approved manufacturers.
14 Plaintiffs and the Class members ordered those shoes through their managers, and
15 JACK IN THE BOX paid the vendor for the shoes. JACK IN THE BOX then deducted
16 what it said was its cost for those shoes from Plaintiffs' and the Class members'
17 paychecks. Throughout this process, JACK IN THE BOX was acting as Plaintiffs' and
18 the Class members' purchasing agent. As their purchasing agent, JACK IN THE BOX
19 owed them a fiduciary duty of loyalty.

20 68.

21 JACK IN THE BOX breached its fiduciary duty of loyalty to Plaintiffs and the
22 Class members by securing a kickback, bribe or commission from the vendor. This
23 self-dealing and conflict of interest directly damaged Plaintiffs and the Class

1 members.

2 69.

3 Plaintiffs and the Class members are entitled to an accounting, restitution, and to
4 collect their damages in an amount to be proven at trial, together with pre- and post-
5 judgment interest, as well as declaratory and injunctive relief. Plaintiffs and the Class
6 members hereby give notice of their intent to amend their Complaint to seek punitive
7 damages.

8
9 **EIGHTH CLAIM FOR RELIEF**

10 Equitable and Quasi-Contractual Claims for Return of Money: Rescission,
11 Restitution, Unjust Enrichment and Money Had and Received

12 70.

13 All previous paragraphs are incorporated by reference herein.

14 71.

15 JACK IN THE BOX unlawfully took possession of money belonging to Plaintiffs
16 and the Class members. Plaintiffs and the Class members received nothing in return
17 for the kickback/commercial bribe portion of the money, and overvalued shoes in
18 return for the remainder, both of which were obtained only under duress of losing
19 their jobs.

20 72.

21 JACK IN THE BOX has failed to refund the money and has been unjustly
22 enriched thereby, and equity and good conscience demand that the Plaintiffs' and the
23 Class members' money be returned.

///

73.

Plaintiffs and the Class members are entitled to an accounting and to recover in restitution the money unlawfully taken from them, in an amount to be proven at trial, in addition to pre- and post-judgment interest.

PRAYER FOR RELIEF


WHEREFORE, Plaintiffs request that the Court certify the Rule 32 classes and FLSA collectives as indicated herein; award them and the other Class and Collective members such actual, statutory, penalty, liquidated and other damages as they may be individually entitled to, as set forth by category above and in amounts to be proven at trial; award the attorney fees, costs and expenses of suit of Plaintiffs and the other Class and Collective members; order Defendant to pay pre-judgment and post-judgment interest on all amounts due to Plaintiffs and the other Class members as a result of their state-law claims; order an accounting; declare Defendant's violations as enumerated herein and enjoin Defendant from committing similar violations in future; and order such further or alternative legal and equitable relief as the Court deems appropriate.

JURY DEMAND

Plaintiffs hereby demand a trial by jury.

DATED this 5th day of June, 2014

JON M. EGAN, P.C.


 Jon M. Egan, OSB #002467
 Attorney for Plaintiffs